ROMAN LAW AND MOHAMMEDAN JURISPRUDENCE

III.

AFTER having, in a summary manner, reviewed the historical connection existing between the Roman and Mohammedan laws, and examined the social condition of their respective people, we now come to our last theme, namely, the comparison of their laws proper, which will show their similarity in more than one point. This examination—which will be preceded by an explanation of jurisprudence in both systems and an attempt to show the likeness of their respective jurisconsults—will be limited to certain subjects of personal law and contracts, and concluded with a few observations on judicial organization.

JURISPRUDENCE

Jurisprudence, according to the Roman conception, is the knowledge of divine and human things; it is the science of the just and the unjust. [185]

This definition has been severely criticised by various writers as not giving the exact idea of jurisprudence, and a distinguished English jurist went so far as to charge the Roman jurisconsults who adhered to that definition with "contemptible imbecility."[186]

It has been very often well observed that we should not view the thoughts of ancient sages with our modern standard of conception, but that, on the contrary, in passing judgment upon ideas, and even prejudices which have been the growth of centuries, we should entirely divest ourselves of actual conditions and environments.

On the other hand, we should not lose sight of the fact that in ancient Rome, as well as in its sister country, Greece, religion and law were so much interwoven with each other that theology and jurisprudence were inseparable. Their laws, therefore, consisted not only of legal maxims, but also of rules prescribing the religious rites and ceremonies. In fact no person could have been a good priest or *pontifex* without knowing the laws; and vice versa, in order to be a good jurist it was necessary to be a theologian.[187]

It was a current belief amongst the Greeks that their laws had a divine origin, thus the Cretans thought that their legislator was not King Minos, but Jupiter himself; the Lacedaemonians, on the other

[185] Just. Inst. I, I, I, *Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*

[186] Austin, Lectures on Jurisprudence, p. 223, Ed. 1869.

[187] See Coulanges. La cité Antique, p. 218 et. seq. Cicero, De legibus II. 19. *Pontificem neminem bonum esse nisi qui jus civile cognoscit.*

hand, asserted that it was not Lycurgus that framed their laws, but Apollo. Nor, it seems, was it otherwise with the early Romans, according to whose tradition Numa wrote their laws at the dictation of the Goddess Egeria; the Etruscans being not less firm in their belief that their laws were given by God Tages.[188]

We must, therefore, not be surprised if jurisprudence was defined as being the knowledge of things divine and human. A contemporary civilian,[189] expressing his opinion on the subject, observes very justly that the law at that time wished to regulate not only the worldly relations between men, but also those with the divinity, such as the organization of the religious rites and those pertaining to sacerdotal functions. The reason of the adoption of that definition by the compilers of the "Corpus Juris Civilis" was that even during Justinian's time the Christian bishops continued to combine their religious duties with judicial functions.

Now the rules concerning religion, either of a dogmatic or ritual character, and those concerning both the private or public life of the Muslims, is known by the name of "Ilmi Sheri," namely, the science of Sheri. According to Mohammedan belief, it is God who is the original legislator of the "faithful"; He opened for them the way of salvation by laying down in the Koran and in the dicta of his "prophet" "the rules of conduct." The way which leads to salvation is called "Sheriat." Hence the name of Sherii, given to Mohammed.[190]

The science of *Sheri* is divided into (1) *Ilmi Kelam,*—which translated literally means the science of the word,—which is the dogmatical part of religion; and (2) *Ilmi Fikih,* literally the science

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[188] Coulanges, op. cit., p. 221.

[189] Accarias, Précis de droit Romain, Vol. I, p. 5, note 5, and p. 78. The word jurisprudence has a different meaning in modern languages. In English it is synonymous with law, whilst in the legal language of France—which is accepted by the people of continental Europe—by jurisprudence is meant the judicial construction of a law, namely, the law of adjudication. Jurisprudence, on the other hand, according to the Mohammedan conception, is the knowledge of the decisions of God in regards to the various actions of responsible (human) beings. Ibn Khaldoun Prolegomenes-Historiques, Vol. XXI, p. 1. These decisions, in the words of the Arabian writer, have regard to the obligation of doing or not doing certain things; and they are to be found in the Koran, in the dicta of the "prophet," and in the interpretation or "the indication furnished by the divine legislator." Ibn Khaldoun, op. cit., p. 1; see also N. V. Tornau. Das Moslemische Recht, p. 15.

[190] The word *Sheri* means literally, the showing of the way. Mirza Kazembeg. Muchter-ul-Wikayet, p. 4, quoted by Tornau, op. cit., p. 15, note 2; or direct road, Savvas Pasha, Etude du droit Mussulman, p. 125, 126. But, it seems, that the direct road which indicates to the Muslims the place of salvation, has also certain pathways called "Mezheb" which lead to the same place; and that the jurists who opened these pathways are the chiefs of a system of legislation known by the name of "Sahibi Mezheb," namely, masters of pathways.

of understanding, consisting of the rules prescribed for the exercise of religion or the practical part of it; and the legal maxims regulating the worldly affairs of the Muslims both between themselves and unbelievers.[191]

The compilers of the Mejelle, namely, the Turkish Civil Code, have defined jurisprudence as the science of knowing the practical questions relating to the Sheri.[192] Therefore, according to the Mohammedan conception, law and theology are linked together. Hence the belief of a stern Muslim that the "faithful" alone can understand the Mussulman law, and that an "unbeliever," no matter how well he may be versed in the Arabic language, cannot grasp the spirit of the Islamic legislation. It is precisely on account of the narrow minded view of the Mohammedan theologians that the Turkish government, being pressed by circumstances and the political exigencies of the time, was obliged to separate the courts applying the laws of the Sheri from those administering "justice" in accordance with laws more in harmony with state and international obligations.

JURISCONSULTS

The part played by the Roman Jurisconsults in various epochs of the history of their country is too well known to deserve a lengthy dissertation. Suffice it to say that they were inferior to none in social life and superior to many in state matters. It is true that after the divulgence of the mysteries of the *leges actiones* they lost the prestige which they formerly had, but they still enjoyed the not less enviable position of expounders of the law, when in the words of a distinguished German author, "from the time of cock crowing people began to rap at their door";[193] and according to the graphic description of a French writer, the aristocratic jurisconsult, seated in his atrium and surrounded by his clients, pronounced his dicta as a species of oracles.[194]

In the course of time the *responsa prudentium,* i. e., the answers to legal questions made by the jurists, formed the *lex non scripta*

[191] Tornau, op. cit., p. 26 and 55. A concise definition of Sheri is "the art of knowing things in favor of or against oneself;" Marifet ul nefsi ma leha ve ma aleiha. Savvas Pasha, Droit Mussulman, p. 3.

[192] Mezellé, Turkish Text, Ilmi Fikih messaili Sheriei ameliei bilmeketer.

[193] Ihering, Geist des Romischen Rechts, Vol. II, p. 415.

[194] Ortolan, Explications des Instituts, Vol. I, p. 197, Ed. 1863. See also Cicero de orat. 1, 45, who in referring to the jurisconsults calls them *"Oraculum totius civitatis."* Ihering, Vol. II, p. 415.

by which the magistrates were guided in their interpretation of the written law.[195]

The opinions of the jurisconsults had not, however, an obligatory force and the judges were not bound to consider them as law proper,[196] but there was only a moral obligation to be guided by such interpretations. But if many jurists made the same construc tion of the law, the judges could not easily decide contrary to the opinions of such authorities.[197] During the reign of Emperor Hadrian a judge was bound by the *responsa prudentium* if the same interpretation was made unanimously.[198] Whether the opinions of the jurisconsults had a legal obligation or not, it is certain that these interpreters of the law enjoyed the highest distinctions in the state and were amongst the most noted citizens of the Roman body politic. Their influence was felt everywhere, and their opinions and advice were sought not only by the lowest plebeian, but also by the highest patrician, and even by the Emperors, many of whom undertook nothing without consulting them.[199]

THE MOHAMMEDAN MUFTI

If now we turn to the Mohammedans, we see that they also had, and still have, their jurisconsults known under the name of "MUFTI," who do not differ much from their Roman colleagues. In fact, a Mufti is a person who gives a fetwa, i. e., an opinion on legal questions which corresponds to the *responsum prudentium* of the Romans. He is, in a word, the expounder of the law, when there exists a doubt as to its true meaning, in order that the Cadi, or Judge, may be guided in his decision.[200]

It seems that in the early days of Mohammedanism the "readers" of the Koran were the only persons who could furnish any information in regard to its contents, because the great majority of the

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[195] *Proprium jus civile, quod sine scripto in sola prudentium interpretatione consistit.* Dig. I, 2, 2, 12, i. e., our own civil law which, unwritten, is made up of the mere interpretation of those skilled in law. Quoted by Salkowsky, Roman Private Law, translated by Whitefield. See also Maynz, Cours de droit Romain, Vol. I, p. 147-148; also Voight, Römische Rechtsgeschichte, Vol. I, p. 226 et seq.

[196] See Cuq. Institutions Juridiques des Romains, p. 468.

[197] Maynz, op. cit., I, p. 147, 148.

[198] Cuq., op. cit., 469.

[199] As both philosophers and jurisconsults had no right of action against the parties who consulted them, the former as it was said, looked upon money with contempt; the latter, because it would have been dishonorable for them to demand payment, though they could have received such payment without shame, usually received advance money for their labor. See Accarias Précis de droit Romain, Vol. II, p. 1318, Note 5; see also Ihering, op. cit., Vol. II, p. 413.

[200] See Hammer Purgstall, Geschichte des osmanischen Reiches, ed. 1840, Vol. I, p. 586-587. Also Savvas Pasha, Theorie du droit Mussulman, Vol. I, p. 138, and Vol. II, pp. 33-39.

Arabs were illiterate, but when at a later epoch learning began to be diffused amongst them, the readers were replaced by the Fakihi, i. e., the jurists and the Ulema, i. e., the learned. The jurists at that time were divided into two schools: the one in order to interpret or construe the law had recourse to their own judgment and the system of analogy; these lived in Irak; the adepts of the other school limited the sources of law to the Koran and the traditions and dicta of Mohammed. The latter resided in Arabia, hence their pretention of understanding the law better than their antagonists on account of their proximity to the residence of their prophet. At the head of the first school stood Abou Hanifa, hence the "Hanifites." The second had as their chiefs Malek and Shafei, hence the Malekites and Shafeites. It seems that Malek relied to a great extent on the customs of Medina, which, according to his opinion, were based on the acts of Mohammed.[201]

It is, however, related that Shafei, after the death of Malek, went to Irak and there studied the doctrine of Hanefi, and combining the theory of Hanefi with that of Malek formed a system of law of his own; hence the Shafeites. (It is said that Shafei studied Roman law in Syria.[202]) Hanbal, another follower of Malek, did the same, and founded a system of his own, hence the Hanbalites.[203] But it should be observed that in the early days of Islam, the learned class, including the jurists, were either foreigners or of foreign origin. Ibn Khaldoun tells us that the latter differed even in language or the idiom they used from the aboriginal Arabs; these were, according to the Arabian author, children of the desert and had no knowledge of any science or art.[204] Mohammed, himself, assumed the name of the illiterate prophet (Ibn Khaldoun, Vol. 21, p. 296, note 3), but he urged the "faithful" to be always guided by the Koran and his Dicta. "I leave you," he said to his companions, "two things which will protect you from being misguided as long as you are attached to them; these are: 'the book of God (Koran) and my Dicta.'"[205] It seems that Mohammed himself had admitted that the learned people of his epoch were foreigners. "If," he said, "the science was *hanging* from the 'neck of heaven' there still would have been people amongst the foreigners who would be able to reach it."[206]

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[201] Ibn Khaldoun, Vol. XXI, op. cit., p. 6-7.
[202] Kremer, Culturgeschichte der Kalifen, Vol. I, p. 536.
[203] Ibn Khaldoun, Vol. XXI, p. 7.
[204] Khaldoun, Vol. XXI, p. 296.
[205] Ibn Khaldoun, Vol. XXI, p. 298.
[206] Khaldoun, op. cit., Vol. XXI, p. 300.

Be that what it may, the institution of Mufti or Mussulman jurisconsults dates as far back as the days of the early Kaliphs, hence the presumption, if not the certainty, that it was borrowed from the Romans, then in existence in the provinces of the Greco-Roman Empire under the Arabian conquest. The Muftis correspond more to the Roman jurisconsults during the Empire, when they were recognized officially or appointed by the Emperors. The Mufti also were appointed by the Arabian Kaliphs or the Emirs of Spain during the Moorish conquest, and are still considered as state officials by the existing Mussulman sovereigns. Their opinions, as was the case with the *responsa prudentium* of the Romans, are not binding upon the judges.

According to Ibn Khaldoun,[207] a Mufti should never undertake anything beyond his powers, because Mohammed is supposed to have said, "Whoever amongst you shall be the boldest to be a Mufti shall go to hell fire."

As the Roman jurisconsults, so the Mussulman Mufti enjoyed the highest consideration in the Mohammedan world. In the opinion of a distinguished orientalist and historian, in no country, with the exception of China, were the jurists held in higher esteem, nor had more influence in state affairs, than in the Ottoman Empire.[208] It seems that it was not unusual in past times for a Turkish minister to hold the stirrups of the horse of the Mufti on the day of his appointment.[209] If the Romans had their Scipio Nasica, to whom the Senate made the gift of a house in the Via Sacra, in order that he might be of easy access to the public;[210] the Turks had their Dzmeali, who was richly recompensed by his sovereign for his learning and highly esteemed by the people for his impartiality and justice. It is said that he was so impartial in his legal opinions that he did not even allow the persons who sought his advice to see him, but that they were in the habit of laying their written questions in a basket which hung from the window of the famous jurist, and on the next day the answers were taken in the same way by the people from the basket.[211] Hence the nickname of Zenbilli Mufti, namely, "The Jurist with the basket," given to this jurisconsult. It was through the influence and ingenuity of this distinguished jurist that the lives of the Christian subjects of the Empire were saved when

[207] Vol. XIX, p. 447-448.

[208] See Hammer, Histoire de l'Empire Ottoman, Vol. III, p. 332.

[209] See Hammer Purgstall, Geschichte IV, p. 507.

[210] Ortolan, op. cit., Vol. I, p. 197. *"Cui etiam publice domus in sacra via data est, qui facilius consuli posset;* Pomponius Fr. 2, Sec. 37 Dig. 1, 2, quoted by Maynz, op. cit., Vol. I, p. 147, note 10.

[211] Hammer, op. cit., Histoire IV, 363.

the reigning sanguinary Sultan Salim I (and the usurper of the Caliphate) had ordered that all the Christians should either embrace the faith of Islam or be massacred.[212]

If Rome had its Labeo and Capito, the originators of the famous Proculian and Sabinian Schools; the Mohammedans had their Hanefi, Malek, Shafei and Hanbal, the founders of the four renowned systems of Mussulman jurisprudence. Whilst the two Scaevolas, Ulpianus, Gaius, Papinianus, and numerous other jurists gave so much lustre to the Roman legal science, the Ottomans had also their Kourani, Kosref (a Greek renegade), Arabi, Ebousoudi, Halebi and others, whose opinions are still held in high esteem, not only in the Ottoman Empire, but also in the Mohammedan world in general.

MARRIAGE

Leaving aside the various kinds of marriages of the Roman Law, with which we are not here concerned, and examining that celebrated between Roman citizens, we see that, in the words of the Institutes, it is "the union of man and woman involving an absolute community of life";[213] and according to Modestinus, "it is the union throughout life, and a community of things divine and human."[214]

Notwithstanding the marital authority of the husband, the wife was his equal in many things, and as he was the master she was also the mistress of the house.[215] If he was clarissimus, she was clarissima, and participated in his *sacra privata*, namely, the worship of his domestic deities. Hence her appellation of *"socia rei humanæ atque divinæ domus."*

An essential condition for the contract of marriage was, no doubt, the consent of the parties, though in the earlier days of Rome, a pater familias could probably compel the persons under his authority to marry;[216] but the consent of the pater familias was necessary, unless he withheld it without any justifiable reason.[217] But it was not essential that the contract should be in writing.[218] Cohabitation was a presumption of marriage, especially if the parties appeared in public as husband and wife.[219] Justinian, however, ordered that persons of high rank, such as senators and others, should prove

[212] Hammer, Histoire, IV, p. 365.

[213] Inst. I, 9, 1.

[214] D., I, 32, 2. See also Harmenopoulos IV, 4, 1.

[215] Maynz, op. cit., III, p. 16; Accarias 1, S. 79; Coulanges, op. cit., p. 108, *Ubi tu Caius ego Caia.*

[216] Accarias 1, S. 174, Note 2.

[217] Maynz, op. cit., III, p. 11.

[218] Accarias, I, sec. 81, Maynz, III, p. 13.

[219] Accarias, I, S, 81, Maynz, III, p. 13.

their marriage by written contract.[220] As late as the epoch of that Emperor, neither the intervention of the public authorities nor the performance of a religious ceremony was necessary for the validity of a marriage,[221] but the emperor, Leo the Philosopher, prescribed a religious ceremony.[222]

There is a controversy amongst civilians as to whether the *deductio in domum mariti,* namely, the taking of a woman to the home of the husband, was an essential condition for a lawful marriage. Some hold that this was a pure ceremony and not essential for the validity of the contract of marriage;[223] others think that it was a necessary condition, and that, therefore, though an absent man could lawfully marry, provided the woman was taken to his house or a place indicated by him, the *converse* was not possible.[224]

According to the Mohammedan Law, marriage is purely a civil contract,[225] it being assimilated to a contract of sale and purchase. The husband is the purchaser and the wife the vendor.[226] A proposal and acceptance or a declaration and consent are sufficient for the formation of such contract.[227] It is not necessary that the contract should be in writing.[228] The jurists of the Shii sect hold, however, that the sacramental words prescribed by law are necessary for the validity of a contract of marriage.[229]

But the Mohammedan conception of matrimony differs from the Roman in point of morality, since according to the Mussulman Law it is a contract having for its object the right of enjoyment and the procreation of children.[230] This is, no doubt, a low conception of matrimony and not in harmony with the ideas of civilized communities.[231]

As to whether the consent of the woman for the contract of marriage is necessary or not, opinions differ, some holding the

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[220] Accarias, I, S. 81.

[221] Accarias, I, sec. 181.

[222] Accarias, I, p. 177, Note 2.

[223] Maynz, III, p. 12.

[224] Ortolan, op. cit., Vol. I, p. 423. Accarias, I, S. 80. Harmenopoulos, IV, 4, 5.

[225] Hedaya, Vol. I, 71.

[226] Berg Principes du droit Mussulman selon les rites d' Abou Hanifah et de Chafii, p. 97 and 149. Also Nauphal, Systéme Legislatif Mussulman, Mariage, p. 34.

[227] Hedaya, I, op. cit., p. 71. Baillie, Digest of Mohammedan Law, p. 1 et seq.

[228] Berg., op. cit., 149.

[229] Nauphal, op. cit., p. 1.

[230] See Khalil Précis de jurisprudence Mussulmane, traduit par M. Perron, Vol. II, p. 316; also Berg, p. 97, Nauphal, 159. Compare, however, sacramental expression of marriage in early Rome. "*Ducere uxorem liberorum quaerendorum causa,* also in Greece, Coulanges, op. cit., p. 52.

[231] Koran, Ch. II, 228. According to Mohammed, women are inferior to men, both in intelligence and religion; and men are the natural "directors" of women, Nauphal, op. cit., p. 202.

affirmative, others the negative; the latter, however, are of opinion that the consent of her matrimonial guardian is essential.[232] If the woman has no matrimonial guardian, i. e., if she has not an agnate, or if she refuses to give her consent, the judge, as representative of the sovereign, may act as guardian for her and consent in her place.[233] Malik, however, holds that if the woman is very pretty and of high birth, the consent of the guardian is essential.[234] If a woman has attained her age of puberty and has never been married, her silence or smile are equivalent to consent; if she has been married before, the consent must be given expressly.[235]

Another essential condition is the presence of witnesses at the time of the celebration of the marriage. The "prophet" seems to have said, "no marriage is good without evidence."[236]

By the Mohammedan law the husband must, before the marriage ceremony, enter into contract by which he promises to pay to his future spouse a dowry. This is divided into two parts: the one should be paid to her before the consummation of the marriage, the other in the case of its dissolution or the death of the husband. The latter corresponds, in one sense, to the *donatio ante nuptias* or *propter nuptias* of the Romans.[237] Some Mussulman jurists hold that the dowry is an essential condition of the marriage contract,[238] it being assimilated to a contract of sale, in which the fixing of price is necessary in order to make it binding upon the parties.[239] Others are, however, of opinion that if the marriage is consummated it cannot be dissolved for want of dowry.[240]

The former writers hold that if the husband does not pay the ante-nuptial dowry, she may refuse cohabitation with him.[241]

As in the Roman Law, so in the Mohammedan legislation, one of the conditions for the validity of the contract of marriage is the placing of the future wife at the disposal of the prospective husband.[242] In fact, it is customary—as it was both in Rome and

[232] Nauphal, op. cit., p. 95, 96, also 107-109. Also Russel and Suhrawardy. First Steps in Muslim Jurisprudence, p. 5.

[233] Berg, op. cit., 145.

[234] Nauphal, op. cit., p. 105.

[235] Hedaya, I, op. cit., p. 97-98. Russel and Suhrawardy, op. cit., p. 5. Berg, op. cit., p. 146. Khalil, Précis, op. cit., I, p. 333-334.

[236] Hedaya, p. 1, 74. Berg, 149. Sachau, Muhammedanisches Recht, Nach schafiitischer Lehre, p. 6.

[237] See Inst., II, 6, 3, Maynz, op. cit., III, p. 52-53. Accarias, I, S. 316 and S. 309.

[238] Hedaya, Vol. I, p. 113-114. Khalil, Précis, op. cit., II, 323.

[239] Nauphal, p. 159.

[240] Russel and Suhrawardy, p. 9; such seems to be the view also of Hanefi. Nauphal, p. 159.

[241] Hedaya, Vol. I, p. 150, Berg, p. 148; Nauphal, p. 169; Khalil, Précis, II. p. 434.

[242] Hedaya, Vol. I, p. 150.

Greece—for the friends of the Mohammedan bridegroom to accompany the bride to the house of her future husband.[243]

A Mohammedan may marry a "scriptural" woman, namely, a Christian or a Jewess, but not a Pagan.[244] But the marriage of a Mussulman woman with a non-Mussulman is null and void.

As is well known, in the early days of Rome, the marriage of a *civis,* or citizen, with a barbarian was prohibited; and by the Roman Law of a later epoch, a Jew had no *connubium* with a Christian. Even according to the canon law of today, the marriage of a Christian with a person of another faith is not valid. In Rome for a long time a social inequality was an impediment to a *justæ nuptia.*[245]

According to the Mohammedan law, equality of social standing of the man and the woman intending to be married is necessary; but it is held that if the latter is of inferior condition it may be overlooked.[246] If a free woman marries a slave, such marriage is not valid. But if the husband being free marries a slave, he must liberate her.[247] By the law of the Shii sect such marriage is valid without liberation.[248] There exists in the countries of the Shii sect three kinds of marriages. The first is of a permanent, the second of a temporary character, i. e., a trial marriage;[249] and lastly comes the matrimony with slaves.

A Mohammedan woman (wife) has certain advantages over the Roman in regard to her legal status in the family; the former continues to enjoy certain of her civil rights. In fact, she can enter into contract, appear in court, either as plaintiff, defendant, or as witness, and dispose of her property without the consent of her husband.[250] The wife may contract debts for her support during the absence of her husband.[251] But notwithstanding these privileges the husband may compel her to stay in the house, and even chastise her.[252] The husband is, however, bound to maintain his wife according to his social standing. But she should obey and follow him wherever he goes; if she refuses, he may chastise her.[253]

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[243] Berg, 149, 150. Coulanges, op. cit., pp. 45, 46.

[244] Hedaya, Vol. I, p. 84; Baillie, pp. 29 and 40.

[245] Maynz, II, p. 9.

[246] Hedaya, Vol. I, pp. 110-111; Nauphal, pp. 199-200.

[247] Berg, p. 146; Nauphal, p. 201.

[248] Sachau, op. cit., pp. 5 et seq; Tornau, op. cit., pp. 62-63.

[249] Tornau, Droit Mussulman, also Sachau, p. 5 et seq. This may appeal to the advocates of the modern school of "trial marriages." Compare recent statement of Mr. Briant, Minister of Justice in France, advocating such unions.

[250] Nauphal, p. 25.

[251] Ameer Ali, Mohammedan Law, p. 281.

[252] Baillie, p. 4 and 5. Compare English Common Law.

[253] Nauphal, 209-210; Berg, 150; Hedaya, Vol. I, p. 113-114; Nauphal, p. 172.

Polygamy being a fundamental institution of Mohammedanism, a comparison with the Roman law in that respect is out of the question.

A Mohammedan, if he is free, may have four legitimate wives; but if slave he is limited to two.[254] But a woman can have only one husband.[255] Mohammed seems to have set no limit to the number of illegitimate wives that a "faithful" may have.

This limitation to four legitimate wives did not, however, apply to the "Prophet," who enjoyed special privileges in that and other respects by the "express command of God" as revealed in a "divine message."[256] In fact, his legitimate wives have reached the respectable number of nine or thirteen, whilst that of the illegitimate is supposed to have much exceeded that number.[257]

In some cases the marriage is null and void *ipso facto*.. Such is the effect of the apostasy of a Mussulman husband or wife,[258] or of captivity or slavery, of either of them.[259] Nor was it otherwise by the Roman law.[260]

In the Mohammedan law incurable impotency dissolves the marriage.[261] In like manner, according to the Roman law a *castratus* could not marry legally,[262] but the *spadones*, namely, those who had a natural impotency, could do so, because it was claimed that it was not possible to prove with certainty such a condition.[263]

By the Mussulman law a marriage may be dissolved in case of insanity, leprosy or elephantiasis of either party.[264]

According to the Roman law an adulteress who had been repudiated

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[254] Hedaya, Vol. I, pp. 86-88; Nauphal, 36 and 99.

[255] Berg, 147, Note.

[256] See Koran, Ch. XXXIII, 49 and 37.

[257] See Khalil Précis, II, pp. 311, 313, 315; Nauphal, p. 50. It seems that this "divine message" granting him special privileges on matrimony was "revealed" to Mohammed because on one occasion he took away from her husband a woman by the name of Kaula, which action was bitterly resented by his beloved spouse, Aysha, who, upon hearing the "message," told the "Prophet" that it seemed to her that God had no other occupation than to satisfy the passions and please the whims of Mohammed. Nauphal, pp. 54-55.

On another occasion, when one of his wives by the name of Hafsa reproached Mohammed for not keeping his oath in regard to his relations with Mary, the slave, "God" again came to the assistance of his "prophet" by releasing him from his oath. Koran, Ch. LXVI. See also Perron, Femmes Arabes, p. 319; also Muir, Life of Mahomet, ed. 1894, p. 413-414.

[258] Hedaya, Vol. I, 182; Berg, 153; Nauphal, p. 97 and 142.

[259] Nauphal, p. 142-143.

[260] Accarias, I, S. 80; Maynz, III, p. 62.

[261] Khalil Précis, II, p. 404 et seq.; Hedaya, Vol. I, 271; Nauphal, 147; Berg. 153. Ameer Ali, p. 271.

[262] Accarias, I, S. 82; Maynz, p. 8.

[263] Accarias, I, p. 184, note 1; Maynz, III, p. 8.

[264] Ameer Ali, op. cit., p. 271; Khalil, Préces, II, p. 404 et seq.

by her husband could not marry the person with whom she committed adultery.[265] Such is also the Mussulman law of the Shii sect.[266]

Mohammedan and other writers assert that the condition of woman in Arabia was ameliorated through the teachings of the "prophet" in various ways. The most important reform introduced by Mohammed is, no doubt, the prohibition of burying their young daughters in some cases by parents.[267] It is also certain that the prohibition of marriages for a few hours, days or months, as was customary amongst the Pre-Islamic Arabs, brought considerable relief to the women of that country.[268] But it is, on the other hand, claimed that the Arabian woman of the pagan epoch had more liberty; that she was equal to man, and that she even excelled in culture and education; in short, she had more advantages over a Mohammedan woman who has been debased by her relegation to the "harem."[269]

No matter what the amelioration of the condition of women in Arabia might have been by the advent of Mohammed, it is beyond doubt that a Mussulman woman, under the system of the Koran, with its degrading and contemptible institution of polygamy and the absolute right of the husband to repudiate his wife whenever impelled to do so by his whim or caprice of the moment, is, in a most abject and pitiable situation, notwithstanding the assertion to the contrary of Muslim authoresses who portray very often with bright colors the happy lot of the fair sex of the Mohammedan faith.[270] As a distinguished orientalist well observed, "A Mohammedan woman is not considered a person, she is not a thing, but a sanctuary of voluptuousness."[271]

DIVORCES

It was a consecrated principle of the Roman law from the time of the XII Tables up to a late epoch of the Christian era, that a marriage could be dissolved as soon as the parties, or one of them, wished to put an end to such union. They even carried the liberty of divorce so far as to consider as null and void all agreements either fettering such liberty or imposing a penalty in case of dissolution of matri-

[265] Maynz, III, p. 9; Accarias, I, S. 91.

[266] Ameer Ali, op. cit., p. 257.

[267] See Perceval, Histoire des Arabes, Vol. III, p. 336; also Perron, Femmes Arabes, p. 167.

[268] Perron Ibid, p. 171.

[269] Perron, Ibid, p. 105; also Muir, Life of Mahomet, ed. 1894, p. 325.

[270] See Alie Hanoum, Nisvan.

[271] Hammer, Histoire de l'Empire Ottoman, Vol. VII, p. 3.

mony.[272] But it seems that notwithstanding the liberty of divorce, the Romans of the early times abstained for centuries from putting into practical execution the right of divorce.[273] Some of the ancient writers assert that the first Roman divorce took place in the beginning of the Fifth Century at Rome; that was the case of Spurius Carvilius Ruga, who was induced by the censors to repudiate his wife on account of her barrenness.[274]

It is claimed that this act met with universal reprobation, and gave rise to much adverse criticism.[275]

Be that as it may, it is certain that towards the end of the Republic and for a long time during the Empire divorces were of frequent occurrence, and in the words of Seneca "women counted the years, not by the number of consuls, but by that of their husbands"; and according to another writer, in five years women exchanged eight husbands.[276]

Divorce, during that epoch, was very simple. It was effected either *bona gratia,* namely, by common consent, or through the act of one party only, such as by a verbal notification, known by the name of *repudium.* But by the *Lex Julia de adulteriis* it was subsequently enacted that the notification should be made in the presence of seven witnesses,[277] and later on a written notice was considered necessary.[278] The divorce by mutual consent lasted many centuries, and it was only during the middle of the Sixth Century of the Christian Era that it was prohibited, unless it was done, as it was said, *propter castitatem,* namely, for the sake of chastity.[279] Divorce by way of repudiation was, however, still permitted, but only for serious reasons.[280]

The Mohammedan divorce, on its side, is as simple as that of Rome of the early epoch, with this difference, that it is only the husband that has the right to dissolve the marriage, the wife not being allowed to do so, except in some special cases, and that with the intervention of the magistrate. Leaving aside the various kinds

[272] Accarias, I, S. 97.

[273] Accarias I, p. 7; Coulanges, p. 48.

[274] Accarias, I, Sec. 97. An ancient Roman writer, however, mentions a divorce during the middle of the Fifth Century of the City, Maynz, III, p. 64, note 2.

[275] Maynz, III, 63. According to a Roman writer (Aulus Gellius, X, 15, 23), the marriage of a *flamen* of Jupiter could not be dissolved; and Dion of Hal, II, 25, asserts that such was the case originally of the woman who fell under the manus of her husband by the marriage of *Confarreatio,* Accarias, I, p. 219, note 2.

[276] Quoted by Accarias, I, Sec. 97.

[277] Accarias, I, S. 97; Maynz, III, p. 64.

[278] Maynz, Ibid., p. 64.

[279] Accarias, I, S. 98.

[280] Accarias, I, S. 98; Maynz, III, pp. 65-66.

of dissolutions of marriage that exist in the Mussulman legislation, with which we are not here concerned, and examining generally the forms prescribed for a divorce, we see that the husband may repudiate or divorce his wife by employing any kind of expression, such as "you are divorced," "veil yourself," "I give you to your family," and the like.[281] It is immaterial whether the expressions of repudiation are used by the husband as a joke, in a moment of anger, or under the influence of liquor, the marriage is *ipso facto* dissolved.[282]

There exists in the Mohammedan law a peculiar provision, that, if the husband divorces his wife three times, or uses merely the expression that "he divorced her thrice," he cannot marry his former wife unless she first marries another person, and after being repudiated by the latter (which is usually agreed previously) the first husband is allowed to marry her again.[283]

It seems that this strange humiliation was imposed by Mohammed upon the husbands in order to check the then existing abuse in Arabia when men used to repudiate their wives and take them back as often as they pleased.[284] Therefore, the conduct of the "prophet," though not justifiable, may at least be explained.

In some cases the husband may allow his wife to divorce him. Thus, if he would say to her, "If you are desirous that God should torment you with hell fire," and she should answer, "I desire such torment," the marriage is dissolved.[285] The husband may also consent to the dissolution of the marriage if the wife pays him a compensation equal to the amount of her dowry.[286]

If the husband does not pay to the wife the promised dowry or does not support her, she may divorce him also.[287] After the death of the husband, the wife should keep mourning for the period of four months and ten days, during which time she should abstain from the use of perfumes and not wear ornaments, nor should she "dye the edges of her eyelids."[288] In a like manner a divorced

[281] Hedaya, Vol. I, p. 201 et seq.; Baillie, 205; see Nauphal, 115; Berg, 155; Khalil Précis, II, 66, 520 et seq. and 560.

[282] Nauphal, p. 56.

[283] Koran, Ch. II, 230; Hadaya, Vol. I, 301; Berg, 155; Nauphal, 99; Khalil Précis, II, 543, 561 and 376; Muir, Life of Mahomet, ed. 1894, p. 327 et seq.

[284] Nauphal, 101, 102.

Long before the advent of Mohammed, an Arabian philosopher taught that if the woman was not a good cook, or if the husband found another woman whom he liked better, he could divorce his wife. (Compare with modern theory of "affinity" marriages.)

[285] Hedaya, Vol. I, 314-315.

[286] Hedaya, Vol. I, 314-315; Berg, 154.

[287] Berg, 154.

[288] Hedaya, Vol. 21, p. 370.

woman cannot remarry until after the expiration of four months and ten days.[289] A Roman widow was obliged to keep mourning for ten months, a Christian Emperor extending it subsequently to one year.[290] The same rule applied in the case of a woman who was divorced for a justifiable cause.[291]

From the above cursory exposition of the law of divorce amongst the Mohammedans it is evident that the position of a Muslim wife is not enviable. It depends entirely on the whim of the husband to put her out of doors no matter what the consequences might be for her. It is true that the law prescribes that the husband should maintain the children, but no alimony whatever is provided for an innocent woman, except for a short period of time called "the time of retreat," during which a divorced woman cannot conclude a new marriage. The payment to her of the dowry is an illusory remedy, it being generally insufficient to provide for her needs. A Mussulman woman, therefore, if she is destitute of means to support herself, is either reduced to misery or is compelled to marry any person in order to save herself from starvation. Nor does there seem to be any hope that Mohammedan legislation will undergo any material change in regard to divorce, because its provisions are based on the express commandments of "God," given to the faithful through the "Holy Book."

WILLS AND TESTAMENTS

We know that in Rome, at a certain epoch, wills and testaments were governed by religious and state exigencies; but in the course of time this theocratic and political rigidity was abandoned by the combination of the three different sources from which the law on wills depended; namely, the divine law, the praetorian legislation, and the Imperial Constitutions. But the Mussulmans, at no time, had any reasons for imposing upon the testator any strict formalities. According to Mohammedan law a person may make a valid will, either holographic or not, or a secret will, provided it is executed in the presence of two witnesses[292]

According to the Institutes of Justinian the testament of insane persons—with the exception of those who have lucid intervals, and make their wills during moments of sanity—of deaf and dumb by birth, of persons who have not reached the age of puberty, of prodigals under legal interdiction, of prisoners of war, of slaves, and of a

[289] Ameer Ali, 257; Koran, II, 228.
[290] Accarias, Vol. I, Sec. 97; see Maynz, III, p. 66.
[291] Accarias, I, S. 98; Maynz, Ibid., p. 66.
[292] Koran, II, 105; Khalil, Code Mussulman, Art. 2128-2180; Berg, op. cit., 138.

filius familias,—except in regards to certain kinds of peculia,—was not valid.[293]

The Mohammedan law provides that in order to make a valid will, the testator should be free, have sufficient understanding and the legal capacity to dispose of his property by will.[294]

By the Roman law of a certain Christian epoch the testament of an apostate, or that of a certain class of heretics, was not valid.[295]

The same rule applies to legacies in favor of such apostates and heretics.[296]

In like manner the will of a Mohammedan who *abjures* his faith, and a legacy in favor of such person, is null and void.[297]

But the testament of a non-Mussulman bequeathing unlawful things, such as wine, to a Mussulman is not valid.[298]

A Mussulman, however, may leave a legacy to a non-Mussulman subject.[299] This is supposed to be founded upon the following verse of the Koran: "Ye are not prohibited from acts of benevolence towards those who subject themselves to you."[300]

By the Roman law a testator should have the legal capacity at the time of the execution of the will.[301]

But by the Mohammedan at the time of the death.[302]

According to both legislations, a bequest in favor of a posthumus, or after-born, child is, in principle, valid. But the Roman law makes it conditional upon the legal capacity of the legatee to inherit from the testator at the time of the devolution of the inheritance.[303]

By the law of the XII Tables a Roman citizen could dispose by will of his property, but by the subsequent legislation an heir was entitled, as it was called, to his *quarta legitima*,[304] and by the *Lex Falcidia* it was enacted that a legacy could not exceed three-fourths of the inheritance.[305] The Mohammedan law also prescribes that the testator cannot bequeath more than one-third of his property,[306]

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[293] Inst., II, 11, pr. et seq.
[294] Khalil, Code, Art. 2048; Sachau, op. cit., 189.
[295] Accarias, I, S. 326; Maynz, III, p. 300.
[296] Accarias, I, S. 329; Maynz, III, p. 320.
[297] Khalil, Code, Art. 2062; Berg, 141.
[298] Khalil, Code, Art. 2071.
[299] Khalil Code, Art. 2060.
[300] Hedaya, IV, p. 437.
[301] Accarias, I, S. 326.
[302] Khalil, Code, Art. 2101.
[303] Inst. II, 20, 28; Khalil, Code, 2049; Hedaya, IV, 417.
[304] Inst. II, 17, 21.
[305] Inst. II, 22.
[306] Hedaya, IV, 4681.

and that if it exceeds that limit the bequest is void, unless it is ratified by the heirs.[307]

CONTRACTS

CONTRACTS RE OR BY DELIVERY

The contracts known in the Roman law as contracts *re* or by delivery are the *mutuum,* the *commodatum,* the *depositum,* and the *pignus.*

The *mutuum* is defined as being a contract by which a person gives to another a quantity of things which may be weighed, measured or counted, the party receiving them promising to return, not the same things, but others of the same nature, quality and quantity.[308]

The same contract *mutatis mutandis* exists in the Mussulman legislation, its definition not differing much from that of the Roman law.[309]

COMMODATUM

The Roman *commodatum* is also a contract by which a person gives gratuitously to another a thing to be used and returned to the owner.[310]

In like manner the Muslims defined it "as a license to use the property of another;[311] or a contract by which a person procures to another the temporary and gratuitous enjoyment of a thing";[312] and lastly, according to the Turkish Civil Code, it is the possession of a thing in order to use it gratuitously.[313]

The law as to the liability of the borrower in case of deterioration or loss of the thing is the same in both legislations. Thus, by the Roman law, the borrower is responsible for his negligence, but not for any accidental deterioration or loss.[314]

Nor is it otherwise in the Mussulman law.[315]

DEPOSITUM

According to the Institutes of Justinian the depositary was not answerable for the deterioration or loss of the thing deposited with him, if that was due to accident or light fault (*culpa levis*); but he was responsible if there was wilful fraud or gross negligence on his

[307] Khalil, Code, Art. 2062-2063.
[308] Inst. III, 14; Maynz, II, 273; Accarias, II, S. 585.
[309] See Berg, p. 96, Khalil, Code, Art. 797.
[310] Inst. III, 14, 2; Maynz, II, p. 284; Accarias, II, S. 595.
[311] Hedaya, III, 297.
[312] Khalil, Code, Art. 252; see also Sachau, op. cit., 463 et seq.
[313] Mejelle, Art. 765; also Art. 812.
[314] Accarias, II, S. 594; Maynz, II, 285-286.
[315] Hedaya, III, 279, Khalil, Code, Art. 800; Mejelle, Art. 813-814.

part.[316] In such a case he was bound to indemnify the depositor.[317] By the Mohammedan law also, "if a deposit is destroyed or lost, without any transgression on his (depositary's) part, he is not responsible."[318]

PIGNUS OR PLEDGE

By the Roman law the pledgee could not use the thing pledged. If he did use it, he committed a *furtum,* i. e., he was considered as having used it with a fraudulent intent.[319]

The same prohibition exists in the Mussulman law.[320]

Therefore by the Roman law the pledgee was answerable for the deterioration or loss of the thing pledged in case of fraud or negligence; but not if it was due to accident. In short, he was bound to use the utmost diligence in the custody of the thing.[321]

In the Mohammedan law there is a divergence of opinion in regards to the liability of the pledgee. The law of the *Shii* rite[322] and that of the Malekites of the *Sunni* sect[323] is similar to the Roman. Such is also the view of the Shafeites. The Hannafites, who also belong to the Sunni sect, hold, on the contrary, that if the pledge is lost, even accidentally, the debt is extinguished, which means that in such a case the loss is shared by both parties, the pledger losing his property and the pledgee his money.[324] The Roman pledgor was bound to pay all the necessary expenses incurred in the custody of the thing by the pledgee.[325] A similar provision exists in the Mussulman legislation.[326]

CONSENSUAL CONTRACTS, OR CONTRACTS BY CONSENT

The consensual contracts of the Roman law, which were created by the mere consent of the parties without the necessity of delivery, were the contracts of sale and purchase, letting and hiring, agency and partnership.

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[316] Accarias, II, 597; Maynz, II, 291.

[317] Inst. III, 142.

[318] Hedaya, III, 260; Berg, 107; Mejelle, Art. 768 and 771-777; Sachau, p. 675; Khalil, Code, Art. 768 et seq.

[319] Accarias, II, S. 599.

[320] Hedaya, III, 199; Khalil, Code, Art. 770; Sachau, p. 334.

[321] Inst. III, 14, 4; Accarias, II, S. 599; Maynz, II, pp. 302-3.

[322] Sachau, p. 334.

[323] Khalil, Code, Art. 414.

[324] Hedaya, III, pp. 190-198; Mejelle, Art. 741; also Art. 1108.

[325] Accarias, II, S. 599; Maynz, II, p. 303.

[326] Khalil, Code, Art. 410.

CONTRACT OF SALE AND PURCHASE

The contract of sale and purchase of the Roman law was formed, as we know, by the consent of the parties and their agreement on the price.[327] By the Mohammedan law also it is created by proposal and acceptance.[328] According to both legislations, an actual delivery of the thing sold is not essential for the creation of the contract.[329]

By the Roman law it was essential that the object of the sale, the *res* or *merx*, should really exist, which might have been either corporeal or incorporeal;[330] the sale, however, of things whose existence at a future time is more or less possible, was valid.[331] In like manner the Mohammedan law prescribes that the sale shall not be valid unless the thing sold exists at the time of the formation of the contract.[332]

The conditional sales of the Roman law, such as those *ad comprobationem*,[333] exist also in the Mohammedan legislation.

The sale of certain things is prohibited by both legislations. By the Roman law the sale of religious or sacred things, or that of public places, was null and void.[334] The same provision exists in the Mohammedan law in regard to things *extra commercium*.[335]

According to both systems of law it is necessary that the price should be certain.[336] As to whether the price should consist in money or any other thing, there existed in Rome a controversy between the Sabinians and the Proculians; the former contended that it was not essential that the price should consist of money, but the latter held the contrary view. The Institutes endorsed the opinion of the Proculians.[337] The Mohammedan legislators seem to have preferred the opinion of the Sabinians. In fact, they define sale as an exchange of property for property.[338] But the Turkish

[327] Inst. III, 13.

[328] Hedaya, II, p. 361; Khalil, Code, Art. 1, Berg 85; Mejelle, Art. 167; Query, Droit Mussulman, I, p. 363, Art. 33; Khalil, Précis, III, p. 170; Sachau, p. 275.

[329] Roman Law, see Accarias, Vol. II, S. 601; Moham. Law, Mejelle, Art. 262, *Beide cabz shart deildir.*

[330] Accarias, II, S. 602; Maynz, II, 176.

[331] Maynz, III, 178.

[332] Hedaya, II, 519; Berg, 85; Mejelle, Art. 197, Art. 205 and 363; Sachau, 275.

[333] Inst. III, 2, 3, 4; Accarias, II, S. 613; Mejelle, Art. 298, 299, 300 et seq.

[334] Inst. III, 1, 3, 5.

[335] Berg, 86; Mejelle, Art. 211, also 199.

[336] Roman Law: Accarias, II, 604; Maynz, II, 179; Moham. Law: Hedaya, II, p. 364; Berg, 89; Mejelle, Art. 237, Haidar effendi Sherhi Mejelle, Bei, i. e., Sale, Part II, p. 582; Querry, I, p. 369, Art. 79, 80.

[337] Inst. III, 1, 3, 2.

[338] Hedaya, II, 360; Mejelle, Art. 105; Sachau, 275; Querry, I, 369, Art. 79.

Code says that the sale for money is the most important contract of sale and purchase.[339]

By the Roman law, up to the time of Diocletian and Maximilian, if, in a sale, the price did not represent exactly the value of the thing sold, i. e., if it was sold at less than its real value, the contract was valid; but these Emperors ordered that if the price was less than half the real value of the thing sold, the vendor could cancel the sale and demand the restitution of his property by returning the money received for the price. The vendee could, however, in such a case, retain the thing sold by paying the difference.[340] The Mohammedan law permits also the cancellation of a sale if the price is excessive.[341] But according to the Turkish Code such contract cannot be set aside, unless there is fraud. An exception is, however, made for property belonging to orphans, to eleemosynary institutions, and to the State. In the latter cases the sale may be cancelled if the price is excessive, without the necessity of fraud.[342]

By both legislations, the vendor is obliged to deliver to the vendee the thing sold, or to place it at his disposal; and the vendee, on his part, is bound to pay the price.[343]

According to the Roman law the vendor was under the obligation at the time of the contract, to declare to the vendee if the thing sold had any hidden defects, not visible then, which either diminished considerably its value or rendered it unfit for use. In the absence of such express declaration on the part of the vendor, on the discovery subsequently of such defects by the vendee, the latter had the option either to cancel the sale or demand a reduction of the price.[344] The Mohammedan law also provides that if the purchaser discovers in the thing sold a hidden defect which depreciates its value, he may cancel the sale.[345] But, according to the Turkish Code[346] the vendee cannot retain the thing bought and reduce the price.

According to the Roman law, after the parties entered into a contract of sale, in case the thing sold, being yet in the possession of the vendor, was damaged or perished accidentally, the purchaser

[339] Mejelle, Art. 120.

[340] Accarias, II, S. 604; Maynz, II, p. 210.

[341] Hedaya, II, 471; also Querry, II, p. 393, Art. 262 and 263.

[342] Mejelle, Art. 356, 357.

[343] Roman Law: Accarias, II, S. 605; Maynz, II, p. 182 and 187. Moham. Law: Berg, p. 85; Mejelle, Art. 262; Haidar effendi, II, 659; Sachau, pp. 282 et seq; Querry, I, 199 and 385.

[344] Accarias, II, S. 609; Maynz, II, pp. 201 et seq.

[345] Hedaya, II, pp. 406-407; Khalil, Précis, 298 et seq.

[346] Mejelle, Art. 337. See also, Haidar effendi, II, p. 850 et seq.

sustained the loss.[347] This rule applied, however, to things *in specie,* but not *in genere,* namely, those that may be measured, weighed and counted, because in the sale of such things there is an implied condition that the contract is not perfect until the things are measured, weighed and counted, unless the sale is made *per æversionem,* i. e., *in toto.* Therefore, in sales *in genere,* it was the vendor and not the vendee that sustained the loss in case of accident.[348] The provisions of the Mohammedan law of the Malekite school in regard to the accidental loss of the thing sold, are similar to those of the Roman law, namely, that the purchaser suffers, in such a case, the loss;[349] and also the exceptions concerning the things which may be measured, weighed and counted are the same. But by the Turkish Code (Hanefite school), on the contrary, if the thing is deteriorated or lost, before delivery, the vendor suffers the damage.[350]

Notwithstanding the principles of the Roman law as to the inalienability of the freedom of a citizen, there existed at some epoch of the Roman history a fraudulent practice by which free persons by collusion representing themselves, the one as master and the other as slave, made a sale of the would-be slave, and upon the disclosure by the latter of his condition as free man, the magistrate cancelled the sale, the parties sharing in that manner the proceeds of the sale. Justinian subsequently, in order to stop such fraud, enacted that in such a case the person allowing himself to be sold shall be reduced to slavery.[351] The Mussulman law provides also that if a person sells another as a slave, when he is free he shall restore the purchase money to the vendee, and that the would-be slave shall recover his liberty; but that if the latter encourages the purchaser to conclude the contract, the price money shall be paid to the purchaser, not by the vendor but by such alleged slave,[352] which means that if he cannot pay the purchase money he shall become a slave. (The Shiites also prohibit the sale of free persons.)[353] Non-Mussulmans cannot acquire Mussulman slaves, nor any non-Mussulman minor. If a person acts in violation of this provision, he is compelled to free such slaves.

The purchase of a sacred Mohammedan book by a non-Mussulman

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[347] Inst. III, 13, 3; Accarias, II, S. 612; Maynz. II, p. 183.

[348] Maynz, II, p. 184; Accarias, II, p. 476, note 1.

[349] Khalil, Code, Art. 223, 227 and 230.

[350] Mejelle, Art. 293 et seq. See also, Haidar effendi Sherhi Mejelle, Part II, p. 713.

[351] Inst. I, 3, 4.

[352] Hedaya, II, 505.

[353] Querry, Vol. I, p. 367, Art. 66. See also, Mejelle, Art. 210; Haidar effendi, Part II, p. 503.

is also prohibited. The purchaser is bound to sell it or give it to a Muslim.[354]

LOCATIO-CONDUCTIO

The contract of *locatio-conductio* of the Romans does not differ, in general, from the hiring and letting of the Mohammedans. By the Roman law it is defined as being a contract by which one promises to procure to another the enjoyment of a determined thing or the doing of some work.[355] In like manner the Mussulman jurists define it as being a contract by which a person cedes for a fixed time the usage of a thing or his work and receives as payment, money or other thing.[356] According to the Mejellé it is "the sale of a determined benefit in exchange for a fixed price."[357] But Khalil, of the Malekite school, says that, it is a contract which has for its object the temporary enjoyment of a *movable* or *immovable* property other than a ship.[358]

By the Roman law the conditions required for the validity of this contract are nearly similar to those of the contract of sale, the fixing of the price being an essential condition in both contracts.[359] The same provision exists in the Mussulman legislation.[360]

According to the Mohammedan law, it is unlawful to accept a recompense for teaching the Koran (no doubt to a Mussulman), because the teaching of it to an "unbeliever" is prohibited.[361]

According to the Roman law the death of either the lessor or lessee does not dissolve the contract of *locatio-conductio.*[362] But in that of *locatio operarum,* namely, the hiring of the services of a person, the death of the latter dissolves the contract.[363]

In regard to this question there exists a disagreement between the

[354] Khalil, Code, Art. 5; Précis, III, p. 172 et seq. The writer of these pages, whilst at Constantinople, had with great difficulty purchased a copy of the Koran in the original, but was always asked by Mohammedans who saw it amongst his books to give it to them, or, at least, place it above all other books as "being superior to all of them."

[355] Accarias, II, S. 615.

[356] Berg, p. 92.

[357] Art. 405; also, Haidar effendi, Ijar, i. e., Book on Hiring and Letting, 1062 et seq.

[358] Khalil, Code, p. 339. See also, Art. 1076-1077, for contracts of services.

[359] Inst. III, 14.

[360] Mejelle, Art. 450; Sachau, 549 et seq. "If a person hires another," said Mohammed, "let him inform him of the wages he is to receive." Hedaya, Vol. III, p. 313.

[361] Hedaya, Vol. III, 338. The writer of these pages was unable to find a Mohammedan to teach him the Koran in Arabic, until an "apostate" came to his rescue. The reason given for this prohibition is that an "unbeliever" may deride the "holy book," and until he is converted to the faith of Islam he cannot be initiated into the teachings of the "prophet." It should not be inferred from this that "missionary work" is unknown to Mohammedans; on the contrary, it is the duty of every Mussulman to propose at least once in his life—to an "unbeliever" to accept the "true faith."

[362] Accarias, II, S., 615 et seq.; Maynz, II, p. 221.

[363] Maynz, II, p. 226.

various schools of Mohammedan legislation, some holding that the death of either lessor or lessee dissolves the contract,[364] others being of contrary opinion.

Such is also the construction given to Art. 443 of the Turkish Civil Code, which deals generally with impediments to the execution of the contract of letting and hiring of real property, i. e., that the contract in such a case is dissolved. But in the case of hiring services, it is by the death of the person hired, as in the Roman law, and not that of the person hiring, that the contract is dissolved.[365] But according to the Shii sect, in case of death of the lessor or lessee, the right passes to the heirs.[366] Such was also the law in Turkey before the codification of the civil law, namely, the compilation of the Mejellé.

SOCIETAS OR PARTNERSHIP

There is also a similarity between the Roman *societas* and the Mussulman partnership.

It is superfluous to say that, according to both legislations in a general partnership, in the absence of a special agreement, as to the divisions of profits or losses, the rule of equal distribution of such profits or losses prevails.[367]

The Roman *societas alicujus negotiationes,* namely, a partnership in which the parties do not limit their operations to one kind of trade or business, corresponds to the Mussulman "Shirketi Ainam."[368]

By the Roman law, in a general partnership, the contract comes to an end by the withdrawal of one of the parties from the "societas," and by his death or confiscation of his property.[369] By the Mohammedan law also death dissolves the partnership.[370] In the case of a partnership for a special work, according to both legislations, the completion of the work for which the partnership was formed brings it to an end.[371]

JUDICIAL ORGANIZATION

The judicial organization of Mohammedan countries—except Turkey and Egypt, which have adopted, in its general lines, the French procedure—is exceedingly simple. It corresponds in some way to the *judicia extraordinaria* of the Roman Empire. It is the

[364] Hedaya, III, p. 367; Berg, p. 92.
[365] Mejelle, Art. 443.
[366] Sachau, p. 552.
[367] Roman Law: Inst. III, 25, 1. Moham. Law: Hedaya, II; Querry, I, 497.
[368] Hedaya, II, p. 311.
[369] Inst. III, 15, 4, 5, 7.
[370] Hedaya, II, 314, 315 and 328.
[371] Roman Law: Inst. III, 25, 6, 7. Moham. Law, Hedaya, II, pp. 326-327; Mejelle, Art. 1352.

Cadi or Magistrate that is entrusted with the administration of justice, without the assistance of any associates or assessors.

As the Roman Emperor of the pagan epoch was not only the commander-in-chief of the army and navy, but also the *Pontifex Maximus* and the supreme judicial authority of the state,[372] so in the Mussulman countries the "Khaliph" or the successor of the "Prophet" is the chief spiritual and temporal authority of the nation and the head of the judicial heirarchy of the realm.[373]

As the Roman Emperor called himself the "Great King and the Sovereign of land and sea;"[374] so the Sultan of Turkey today assumes the same title.[375]

It seems that in the early days of Islam, the Khaliphs were the sole magistrates in the state, and that it was the Khaliph Muhteti who first delegated his powers to Cadis or Magistrates.[376] But the Muslim Cadis of those days combined their judicial functions with military expeditions, in order that at the head of the army "they may invade every summer the territory of the Greeks for the fulfillment of their duty of the sacred war,"[377] because, as this Arabian writer tells us, in Mohammedanism war against "the infidels" is a divine obligation; that the faith of Islam is made for all people, and that therefore all should embrace it, willingly or unwillingly. According to this distinguished theologian, the other religions are not destined for all nations, and consequently the advocates or disciples of other faiths are not bound to wage war against people of other beliefs, and they only do so for self-defense.[378] This is a marvelous conception of religion, which is unfortunately prevalent now amongst the Mohammedans in general.

It seems that in the beginning of the Mohammedan era there existed a peculiar view as to judicial functions. It was then a current belief that a person ought not to accept the Magistracy unless he was compelled to do so by his Sovereign, because the "Prophet" is supposed to have said that "Whoever is appointed Cadi shall suffer the same torture as animal whose throat is mangled instead of being cut by a sharp knife."[379]

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[372] Duruy, Histoire des Romains, Vol. V, p. 502.

[373] Ibn Khaldoun, I, Ibid., pp. 448 and 469.

[374] *μεγάλου βασιλέως ἀρχοντος γῆς και θαλάσσης*, Fronto, speaking of Antoninus, quoted by Duruy, op. cit. V. p. 503.

[375] See Turkish coins, where he is styled Hakkan berin-ou-bahrin, i. e., sovereign of lands and seas.

[376] Ibn. Khaldoun, XIX, op. cit., 448.

[377] Ibn Khaldoun, Vol XIX, op. cit., 452.

[378] Ibn Khaldoun, Vol. XIX, op. cit., 469.

[379] Hedaya, Vol. II, p. 616.

It is related that on account of that "holy dictum," Hanefi, the founder of the legal system bearing his name, preferred to be flogged by order of his Sovereign rather than to perform magisterial duties. It seems also that another distinguished jurist by the name of Mohammed did not begin the judicial duties which were assigned to him until after undergoing a forty days' confinement in a jail.[380]

CONCLUSION

The examination of the two systems of legislation, namely, the Roman and Mohammedan, which has been made, shows the connection, and in some parts the identity—at least in contracts—of both legal systems. Leaving aside the laws of marriage and divorce of the Mussulmans, which cannot be compared with those of Rome, as they are founded partly on the local customs and usages of Arabia, existing before the advent of Mohammed, and partly on the teachings of the "Prophet" and their interpretation by Mohammedan jurists, we see that a substantial part of the Muslim jurisprudence, namely, the law of contracts, is based on the Greco-Roman law in force for centuries in the eastern countries subsequently conquered by the Arabians. Besides that, various maxims of the Muslim law betray their Roman origin, showing clearly that the Islamic jurisconsults borrowed freely from the dicta of their Roman colleagues, which must have been widely known throughout the Orient during that time.

That people, professing the faith of Mohammed, should "condescend" to look for guidance in the shaping of their laws to the legal system of "unbelievers," shows clearly the powerful influence exercised by the Roman legislation even on nations so much attached to the teachings of their "prophet" and so stubbornly fixed in the tenets of their religion, whose watchword is, that the "faithful, in regulating their worldly and spiritual affairs, should not depart one iota from the commands contained in the 'Holy Book.'"

But it should be admitted that the honor of engrafting into the Mohammedan jurisprudence some of the principles of the Roman legislation, and generally moulding their legal system according to "infidel" laws, is to be ascribed to the Arabs, to those people of the desert who, notwithstanding the prejudices existing in their religion, attained a high degree of civilization and were for centuries one of the most, if not the most, cultured people of their time.

The Turks, the "heirs" of the Greco-Byzantine Empire, far

[380] Hedaya Ibid., p. 616. We must admit that this strange prejudice against judicial functions was not of long duration, and few stern Muslims, in our days, would shun Magistrial duties.

from imitating the Arabs, shunned anything which might have been at variance with the Mohammedan doctrine, as it is understood by them and interpreted by their theologians. It was from the Arabs, who were their teachers, not only in religion and jurisprudence, but also in literature and philosophy, that they became acquainted with some of the works of the Greek writers, though they occupied the very country from which Hellenic culture, after the Turkish conquest, spread to Western Europe. It is the Arabs whose inspiration, according to a distinguished writer,[381] though less than that of the Hellenes, that gave the primacy to the sectaries of Mohammed during the first part of the Middle Ages; it is the Arabs that shone in arts and sciences; in short, in a moment when the darkness of ignorance seemed to engulf the Christian world in the ninth and tenth centuries, Asia, Africa and Spain were the centers of civilization. It was through them that, for the first time, the Greek philosophy was communicated to the West; and it was these translations which were the torches that illuminated the middle ages, and were the first manifestation of the liberty of thought.[382]

Be that what it may, the Moslim civilization was not and is not of enduring character. The intolerance taught by the religion of Mohammed could not and cannot possibly be tolerated forever by people of other creeds. The followers of Islam were and are unable to attract to their orbit nations of a different faith.

The doctrine of inequality, which is one of the cardinal principles of the Islamic religion, and the command of the "Prophet" that the "infidels" should either embrace the faith of Mohammed or remain in subjection and under the Moslim dominion, contributed to the widening of the gap existing between the Moslim conquerors and the non-Moslim subject races.

In Mohammedan states the assimilation of Moslim conquerors and the conquered Christians, or people of other faith, being impossible, it is no wonder that the subject races, either in Spain during the Moorish dominion or in the Ottoman Empire, in our days have made every effort to shake off the Moslim yoke.

After nearly seven hundred years of Mohammedan dominion, the Spaniards succeeded in chasing their conquerors across the sea and in forming a state which shone so brightly in past years. In like manner some of the subject races of the Ottoman Empire who have partly recovered their freedom, hope, in the course of time, to realize their long cherished wish.

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[381] Vierdot, Histoire des Arabes, Vol. II, p. 107, quoted by Laurent, Histoire du droit des gens, Vol. V, p. 459.

[382] Laurent, Ibid., p. 461. See also, El Makari, History of the Moors in Spain, Vol. I, p. 118.